Nos. 64 and 85

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

CITATIONS

Cases—Continued

Cases—Continued

Cases—Continued.

Statutes:

Miscellaneous:

Miscellaneous—Continued

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No. 61

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 73–75) is reported at 275 F. 2d 646. The Board's Decision and Order (R. 37–47) are reported at 121 NLRB 1629.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960 (R. 72–73), and the decree on March 10, 1960 (R. 73–75). The petition for a writ of certiorari was filed on March 28, 1960, and the cross-petition on May 11, 1960. The petitions were granted on June 27, 1960, 363 U.S. 837 (R. 77).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *

* * * * *

QUESTIONS PRESENTED

1. Whether an agreement which requires an employer to obtain employees exclusively through a hiring hall operated by the union, but does not provide adequate assurances that job applicants will be referred without regard to their union membership, violates the provisions of the Act which forbid encouragement of union membership by discrimination in employment.

2. Whether the Board, as a remedy for such illegal hiring arrangement, may require that the employees be reimbursed for dues and initiation fees which they have paid to the labor organization under that arrangement.[1]

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[1] A similar question as to remedy is presented in No. 68, *Local 60, United Brotherhood of Carpenters, AFL–CIO, et al. v. National Labor Relations Board*, which has been set for argument after the instant cases (363 U.S. 837). Accordingly, to

STATEMENT

A. THE BOARD'S FINDINGS

In 1955, petitioner Union executed a 3-year collective bargaining contract with the California Trucking Associations, which represented a number of motor truck operators located in the southern part of California, including Los Angeles-Seattle Motor Express (R. 55; 8–9). The provisions of the contract relating to hiring of casual or temporary employees were as follows (R. 62–63):

> Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.
>
> Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first

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avoid duplication and in view of the fact that the unions have followed a comparable procedure in their briefs, the remedy question is treated in the Board's brief in No. 68. For the Board's position on that question, both in this case and in No. 68, we therefore respectfully refer the Court to the Board's brief in No. 68.

> call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Pursuant to these terms, the Union maintained a hiring hall for the dispatch of casual employees to the trucking companies who were parties to the agreement and were within the Union's jurisdiction (R. 49; 9, 10, 13).

Lester Slater was a member of the Union, and, for two years prior to the events in this case, had secured casual employment through the Union's hiring hall (R. 55; 14–17). In June 1955, Slater's dispatch card, which under the agreement entitled him to seniority status for referral purposes, was withdrawn by the Union as a result of an employer's removal of him from a job which he was unable to perform (R. 21–24, 63). Thereafter, in consequence of efforts made on his behalf, Slater received a letter from John Annand, International Representative of the Union, stating that the Union had informed him that "you [Slater] may seek work wherever you can find it in the freight industry without working through the hiring hall" (R. 54; 67).

On August 27, 1955, Slater managed to obtain employment with Los Angeles-Seattle Motor Freight Express, a party to the hiring hall agreement, by his own efforts, without being dispatched by the Union (R. 39; 29). Before being hired, however, the employer required him to supply a photostatic copy of

the letter from International Representative Annand (R. 29). Slater continued to work at Los Angeles-Seattle until November 10, 1955. On that day he was discharged by the Company when the Union, having learned of his employment, complained that the Company was violating the hiring agreement by employing Slater absent a referral from the Union and demanded that he be put off the job (R. 39; 26–27, 30). In discharging Slater in compliance with the Union's demand, the Company told him not to return to work until he had the matter "straightened out with the Union" (R. 12).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the hiring hall provisions of the contract in effect in this case obligated Los Angeles-Seattle Motor Freight Express, as a party thereto, to hire casual employees exclusively through the Union. In accordance with its decision in *Mountain Pacific Chapter, Associated General Contractors, et al.*, 119 NLRB 883, 897, the Board further found that this exclusive hiring arrangement did not contain the safeguards specified in that decision, and that it therefore violated Sections 8(a)(3) and (1), and 8(b)(2) and (1)(A) of the Act (R. 37–38).

In the *Mountain Pacific* case the Board had concluded that a hiring arrangement which vested exclusive authority in a union to clear or designate applicants for employment constituted "discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization," in violation of Section 8(a)(3) and (1)

and the correlative Section 8(b)(2) and (1)(A), unless it contained adequate safeguards to assure employees that the union's power would be exercised without regard to union membership. The safeguards are discussed pp. 15, 51–60, *infra*.

Finding further that Slater's loss of employment was the result of the enforcement of the illegal hiring agreement, the Board concluded that his discharge similarly violated the same statutory provisions (R. 39).[2]

The Board's order directs the Union and Los Angeles-Seattle Motor Express[3] to cease and desist from the unlawful practices; and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the order requires the Company and the Union to take appropriate steps to prevent further discrimination against Slater, and to make him whole for losses in wages sustained by reason of the discrimination against him; to refund to the casual employees of Los Angeles-Seattle Motor Express the initiation fees and dues exacted from them under the

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[2] The Board, although setting aside the Trial Examiner's ultimate conclusion, expressly adopted his finding that Slater was a casual employee within the meaning of the contract, and did not disturb his finding that the letter which Slater used to obtain his job with the Company "did not in fact constitute a referral according to the contractual provision relating to casual employees and practices under it" (R. 55, 39, n. 3).

[3] Los Angeles-Seattle Motor Express is the only employer of the signatories to the hiring agreement that was included in the unfair labor practice charges and complaint in this case (R. 47).

illegal hiring arrangement;[4] and to post appropriate notices. (R. 40–44.)

C. THE DECISION OF THE COURT BELOW

The court below, with one judge dissenting, affirmed the Board's unfair labor practice findings in all respects, and granted enforcement of its order, except that portion requiring reimbursement of dues and fees paid to the Union by all casual employees of Los Angeles-Seattle Motor Express. The order was modified to confine the reimbursement provision to Slater alone. (R. 69–72, 73–75.)[5]

SUMMARY OF ARGUMENT

I

Following its decision in *Mountain Pacific Chapter, Associated General Contractors,* 119 NLRB 883, 893, the Board determined in the present case that the hiring agreement between the Company and the Union—which vested the Union with exclusive authority to designate applicants for referral to jobs but did not contain the safeguards to protect nonunion applicants specified in *Mountain Pacific*—violated

[4] The Board limited liability to "the period beginning 6 months prior to the filing and service of the charges herein," and exempted "the period between the date of the Intermediate Report and the date of the [Board's] Order herein, as the Trial Examiner dismissed the complaint" (R. 40, n. 5).

[5] In the Court of Appeals Los Angeles-Seattle Motor Express did not actively oppose enforcement of the order against it, and has not joined in the petition for certiorari which was granted by this Court. It stipulated in the Court of Appeals, however, that any decree ultimately issued by that court in this proceeding would be binding upon it.

Sections 8(a) (3) and (1) and (b) (2) and (1)(A) of the Act. The violation of Sections 8 (a)(3) and (b)(2) turns on a showing that the contract provides for discrimination respecting employment which encourages union membership. In both aspects of illegality—discrimination and encouragement—the statute was violated by the hiring agreement in this case.

A. The divided structure of Section 8(a)(3), which deals separately with "discrimination" and "encouragement", shows that the former term refers to a disparity of treatment between employees in their hire or employment, and that the latter term describes the kind of disparity which is forbidden. The division of the job applicants by the contract in the present case, into those who are cleared for employment through the hiring hall and are thereby eligible for work, and those who are not so cleared and are thereby precluded from working, thus constitutes discrimination within the statutory meaning.

The Union would blur this uncomplicated interpretation by reading "discrimination" to imply a difference in treatment based upon the union status of applicants or employees, and would conclude therefrom that the hiring agreement in this case involves no element of discrimination because it does not expressly provide that union members shall be treated differently than nonmembers. By thus restricting the scope of the term "discrimination" the Union's reading divests the subsequent encouragement or discouragement requirement of any meaning or purpose, and at the same time improperly restricts the kind of

discrimination which Congress sought to proscribe. Under the Board's reading, on the other hand, discrimination is given its common meaning of difference in treatment, and when such differences are established, as in the present case, it becomes necessary to determine whether the purpose, or foreseeable consequence, thereof is to encourage or discourage union membership. If it is, a violation of Section 8(a)(3) is established.

The Board's interpretation is supported by the decision of this Court in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17.

B. The phrase "to encourage or discourage membership in any labor organization" is not of fixed meaning, but reflects a general Congressional policy of protecting the exercise of employee rights to participate in, or to abstain altogether from, unionism. The task of particularizing the area in which this language has application has been vested in the Board as the agency specializing and experienced in the field covered by the Act.

The Board has had extensive experience with the hiring hall in its administration of the Act. This method of obtaining employees originally developed hand-in-hand with the closed shop. In 1947 Congress outlawed the closed shop, and continued the Board's authority to proscribe any other form of discrimination in employment, with an exception immaterial here, which has the necessary tendency of encouraging union membership. Both the Board's experience and available outside evidence have shown, however, that the hiring hall has been frequently, if not

predominantly, characterized in the years since 1947 by preferential treatment of union members.

In the light of its familiarity with the problem, the Board could reasonably conclude, as it did in its *Mountain Pacific* decision, that an applicant, knowing only that his employment can be obtained through referral by a union, "will fear that his opportunity of selection will be small if he does not become a union member * * *" *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585 (C.A. 1). In the absence of effective safeguards that guarantee fair treatment of nonunion applicants, the job seeker cannot be assumed to be insensitive to the widely known fact that hiring halls have frequently preferred their members in making referrals. By making his employment turn upon an exercise of union power, an exclusive hiring agreement necessarily precludes a free exercise by him of his right to refrain from unionism.

Since, as shown above, the hiring hall arrangement itself involves discrimination within the meaning of Section 8(a)(3), the further showing that such halls have a tendency to encourage union membership or adherence to union policies suffices to establish the violation of Sections 8(a)(3) and (b)(2). There is thus no occasion to show that the particular hiring hall in fact operates to the disadvantage of nonmembers. Accordingly, the Union errs in ascribing to the Board a presumption that the hiring hall will operate in this fashion. The Board has made no such pre-

sumption, nor does its application of the statute require it.

II

The same considerations which underlie the Board's finding of a violation of Sections 8 (a)(3) and (b)(2) show also that the hiring hall in this case violates Sections 8 (a)(1) and (b)(1)(A). The latter provisions prohibit an employer and union, respectively, from restraining or coercing employees in the exercise of their right, *inter alia*, to refrain from union membership and from engaging in union activities. Just as a union-operated hiring hall, in the absence of any safeguards of fair treatment for the nonunion applicant, encourages union membership, so does it deprive applicants of any meaningful freedom to refrain from unionism. Conduct which may reasonably cause employees to believe that their employment turns upon subservience to union policies or membership obligations has traditionally been held to violate Sections 8 (a)(1) and (b)(1)(A) of the Act.

III

The Board determined in the *Mountain Pacific* case, and that holding is equally valid here, that the parties to an exclusive hiring agreement might eliminate the illegality which otherwise attaches to such an agreement by providing therein that (1) selection of applicants for referral will not be affected by their union status or sympathies, (2) the employer retains the right to reject any applicant referred by the union, and (3) the provisions relating to the functioning of the hiring hall will be posted for the inspection of

applicants. Since the Board's finding of a violation with respect to the hiring hall rests upon the foreseeable effects such an agreement has in preventing employees from freely exercising their right to abstain from unionism, it was altogether proper for the Board to indicate the manner in which these effects could be dispelled. The protective clauses which the Board has specified assure applicants that their union affiliation will not affect their job opportunities, and lessen the control of the union over job opportunities—a factor which in large measure gives rise to the unlawful encouragement and restraint which otherwise flows from a union operated hiring hall.

The safeguard clauses do not represent an unwarranted intrusion into the substantive provisions of a collective bargaining agreement, as contended by the Union. They reflect, instead, an application of the statutory provisions to hiring agreements, delineating the lawful from the unlawful. In setting forth the safeguard clauses, the Board has followed a decisional method in conventional use, and peculiarly appropriate here, of indicating in its determination of unlawful conduct how the parties might have proceeded lawfully.

IV

Employee Slater was a victim of the unlawful hiring agreement in this case. His loss of employment resulted directly from the enforcement against him of the hiring hall contract. It is settled law that discrimination of this character violates the Act.

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT THE HIRING AGREEMENT VIOLATED THOSE PROVISIONS OF THE ACT WHICH FORBID ENCOURAGEMENT OF UNION MEMBERSHIP BY DISCRIMINATION IN EMPLOYMENT

A. INTRODUCTION

The central question on the merits is the validity of the Board's determination that a hiring agreement between an employer and a labor organization which vests the latter with exclusive control over the selection of applicants violates the Act, in the absence of adequate safeguards to assure job applicants that they will be referred without regard to their union membership. As stated *supra*, p. 6, the leading Board decision dealing with this question is *Mountain Pacific Chapter, Associated General Contractors, Inc., et al.*, 119 NLRB 883, 893, which the Board followed in this case.

In the *Mountain Pacific* case the Board comprehensively surveyed the relevant statutory considerations in the light of its administrative experience, and concluded that the existence of an unqualified hiring agreement of this character, standing alone and "apart from all other evidence in the case," fell within the statutory ban against discrimination in employment to encourage union membership. In the Board's view, such an arrangement was discriminatory because it afforded employment only to those employees who first cleared through the Union, and, this, in turn, had the effect of encouraging employees and job applicants "towards compliance with obligations or supposed obligations of union membership,

and participation in union activities generally." 119 NLRB at 894, 895. The Board added, however, that inasmuch as the "vice in the * * * [exclusive hiring arrangement] lies in the fact of unfettered union control over all hiring," the illegality of such an agreement could be cured if it explicitly provided that: (1) selection of applicants for referral to jobs shall be without regard to union membership requirements; (2) the employer shall retain the right to reject any applicant referred by the union; and (3) the parties shall post for the employees' inspection all provisions relating to hiring, including the foregoing provisions. 119 NLRB at 896, 897.[6]

It may not be seriously questioned in the present case that the hiring agreement in effect between the Company and the Union did not satisfy the safeguard requirements which the Board has imposed in the *Mountain Pacific* decision, and that the holding in that case, if valid, would require affirmance of the Board's findings of violation in this case.[7] Accord-

[6] The Board's *Mountain Pacific* decision was subsequently denied enforcement by the Ninth Circuit (see pp. 46–47, *infra*), which remanded the case to the Board for a determination as to whether the hiring hall was in fact operated so as to prefer union members. The Board accepted the remand, and, finding evidence of such illegal preference, has issued a supplemental decision on that basis: *Mountain Pacific Chapter of the Associated General Contractors*, 127 NLRB No. 156, June 21, 1960, 46 LRRM 1200.

[7] The agreement in this case does not contain any general guarantee against preferential treatment of union members for casual employment. It provides that those who have attained "seniority rating" shall be referred to jobs in accordance with such seniority, "irrespective of whether such employee is or is not a member of the Union" (R. 63). However, contrary to

ingly, decision in this case turns on the correctness of the Board's view that exclusive hiring agreements which do not conform with the *Mountain Pacific* standards violate the Act.

The Board's position has been accepted by the court below and by the First Circuit in *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583. It has been rejected by the Ninth and Sixth Circuits.[8]

The Sections of the Act principally involved are 8(a)(3) and 8(b)(2), which deal specifically with

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the Union's contention (Br. 17), this falls short of a general guarantee. Seniority rating is achieved only by "a minimum of three months service in the Industry," and there is no assurance that union members will not be preferred among those applicants who have not yet obtained, or who have lost and, thus have to reacquire, seniority standing. Similarly inadequate is the no discrimination clause mentioned by the Union (Br. 47). This merely protects employees who are union members and not those who may wish to remain non-members.

As for the employer's right to reject, the Union suggests (Br. 46) that there was a practice in effect under which the Company rejected unsatisfactory applicants referred by the Union. But, no provision is made for this practice, if it exists, in the contract, and the Union does not contend otherwise.

Finally, it is not disputed that the posting requirement of the Board's *Mountain Pacific* decision—plainly the most important of the safeguards under the Board's theory (see *infra*, p. 57)—was not satisfied in this case.

[8] *National Labor Relations Board* v. *Mountain Pacific Chapter of the Associated General Contractors*, 270 F. 2d 425 (C.A. 9); *National Labor Relations Board* v. *Hod Carriers*, decided February 5, 1960, 46 LRRM 2069 (C.A. 9), petition for certiorari pending, No. 75, this Term; *National Labor Relations Board* v. *E & B Brewing Company*, 276 F. 2d 594 (C.A. 6), petition for certiorari pending, No. 211, this Term. See also, *Morrison-Knudsen Company* v. *National Labor Relations Board*, 276 F. 2d 63 (C.A. 9).

unlawful practices respecting hire and tenure of employment. Section 8(b)(2) makes it an unfair labor practice for a labor organization to "cause or attempt to cause an employer to discriminate" in violation of Section 8(a)(3). The latter provision, in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization." The prerequisites to a finding that these Sections have been violated, then, are a showing that (1) there is discrimination respecting employment for which the employer and union are responsible, and (2) such discrimination encourages or discourages union membership. We now show that both these elements are present here.

B. THE HIRING AGREEMENT IN THIS CASE PROVIDES FOR "DISCRIMINATION IN REGARD TO HIRE OR TENURE OF EMPLOYMENT" WITHIN THE MEANING OF SECTION 8(a)(3)

The Union repeatedly asserts in its brief that "There was no discrimination [in this case]" (pp. 27, 25–28). Slater, however, was discharged from his job by the Company at the Union's demand, and the discharge was in full conformity with the provisions of the hiring agreement. The Union's contention that this discharge was not discriminatory, and that no discrimination results from contractual provisions calling for the discharge of an employee who obtains employment by himself rather than through the union hiring hall, is predicated on a reading of the statutory term "discrimination" to require a difference in treatment of an employee which is preferable to his union

or non-union status. Pointing out that Slater "was a member of Local 357 in good standing," the Union concludes that "neither lack of union membership nor default in the discharge of an obligation of union membership could be * * * the foundation for any action against Slater" (Br. 26). Similarly, pointing to the fact that the contract provides that seniority shall be the basis for referring casual employees who have acquired at least three months' service, the Union concludes that the dispatching service generally was not dependent on union membership (Br. 25–26). From this it follows, according to the Union, that there was no "discrimination" in this case, within the meaning of Section 8(a)(3) of the Act.

The Union misreads the statutory language. As shown *supra*, p. 17, Section 8(a)(3) imposes two requirements, the first pertaining to discrimination and the second to the kind of discrimination which is forbidden (that which encourages or discourages union membership). By reading the first requirement—discrimination in employment—to contemplate also that the discrimination be referable to unionism, the Union eliminates altogether the need for and meaning of the second requirement, which establishes the area of discriminatory conduct covered by the statute. But the divided structure of the provision, as well as the normal meaning of the term "discrimination,"*

* The dictionary definition of "discriminate" does not support the Union's assumption that this term necessarily denotes an "invidious" quality (Br. 35). Webster's New International Dictionary Unabridged (Second Edition, 1959) defines "discriminate" as follows: "*Transitive:* 1. To serve to distinguish, to mark as different, to differentiate. *Now Rare.* 2. To sep-

show that the requirement of discrimination in employment is satisfied wherever there is a disparity of treatment between employees for purposes of securing or maintaining employment. Such disparity does not constitute a violation, however, until it is further shown that the difference in treatment encourages or discourages union membership. Thus, in the Board's view, the division of employees by the instant contract into those who are cleared for employment through the hiring hall and were thereby eligible to work, and those who are not so cleared and are thereby precluded from working, constitutes discrimination in employment within the meaning of Section 8(a)(3). If it can be shown that this discrimination encourages union membership, the violation is complete.

The difference between the Board and the Union as to the scope to be given the term "discrimination" is of critical importance in applying Section 8(a)(3) to union-operated hiring halls. By importing into the word "discrimination" the concept of differences "referable to union membership [or] an obligation of union membership" (Br. 28), the Union is enabled to argue that a violation of Section 8(a)(3) presupposes action taken against an employee because he is or is not a union member in good standing. And, since the basis for referral under the agreement here was seniority and not union membership, the Union can

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arate (like things) one from another in comprehension or use by discerning the minute differences. *Intransitive:* To make a distinction: to distinguish accurately * * *. 2. To make a difference in treatment or favor (of one as compared with others) * * *."

add that the Board's finding of violation may only be sustained on the theory that it is presumed that the union will nevertheless discriminate in favor of union members (Br. 34–38). On the other hand, if, as the Board submits, discrimination for purposes of Section 8(a)(3) requires only a showing of disparate treatment of employees in respect to securing or maintaining employment, the mere existence of the hiring arrangement here constitutes discrimination within the meaning of the Section; there is no need to presume that the union will discriminate. Moreover, it then becomes proper to inquire into the foreseeable effects of the exclusive hiring arrangement; for, even though such arrangement does not specifically make union membership a condition for referral, it may nonetheless tend to encourage union membership, within the meaning of the second part of Section 8(a)(3). In short, under the Board's view, the fact that the agreement here required the discharge of any employee who secured employment on his own establishes discrimination, so that the sole remaining question is whether this is the kind of discrimination which encourages union membership.[10]

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[10] It has long been settled law in the circuits that the maintenance of a contract that provides for discrimination in employment which encourages union membership by itself violates Section 8(a)(3) and (b)(2) of the Act, whether or not it is enforced. See, *e.g.*, *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 941 (C.A. 3); *National Labor Relations Board* v. *Lummus Co.*, 210 F. 2d 377, 379–381 (C.A. 5); *National Labor Relations Board* v. *McGraw Co.*, 206 F. 2d 635, 641 (C.A. 6); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519,

The Board's interpretation of the term discrimination is the correct one. The Union's contrary interpretation, as we have shown, violates the general principle that a statute should, if possible, be construed so as to give effect to every word.[11] For, by limiting the term "discrimination" in Section 8(a)(3) to that referrable to union membership or want of it, the Union has divested the separate encouragement or discouragement requirement of any meaningful purpose. In addition, the Union's reading fundamentally alters the statutory description of the kind of discrimination which Congress has outlawed. The language of Section 8(a)(3) does not restrict the term "discrimination," as the Union does, to action based on the employee's union membership, although it certainly includes such action. Instead, the language broadly proscribes discrimination in employment, irrespective of what it is based on, provided that it is intended to, or its foreseeable consequences are to, encourage or discourage union membership.

The Board's reading of "discrimination" in Section 8(a)(3) to mean only a difference in treatment of employees, with the term being given qualitative content by the descriptive phrase "to encourage or discourage membership in any labor organization," is supported, moreover, by this Court's analysis of that provision in *Radio Officers' Union* v. *National Labor*

521 (C.A. 9); cf. *National Labor Relations Board* v. *Revere Metal Art Co., Inc.*, 280 F. 2d 96 (C.A. 2), petition for certiorari pending, No. 412, this Term.

[11] See *United States* v. *Menasche*, 348 U.S. 528, 539, quoting from *Montclair* v. *Ramsdell*, 107 U.S. 147, 152.

Relations Board, 347 U.S. 17. Thus, the conclusion that the term "discrimination" standing alone does not comprehend a difference based on unionism, which without more would constitute a violation, is implicit in the Court's explanation that (347 U.S. at 42–43):

> * * * [T]his section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Similarly, the Court observed that discrimination was not contested there since "involuntary reduction of seniority, *refusal to hire for an available job*, and disparate wage treatment are clearly discriminatory." 347 U.S. at 39 (emphasis supplied). As here, the question in *Radio Officers* was whether such differences in the treatment of employees satisfied the remaining prerequisite to the finding of a violation, *i.e.*, encouragement of union membership (*ibid.*).[12]

[12] To be sure, the reason for the disparate treatment in *Radio Officers* and the cases consolidated with it, was the employees' lack of union membership or lack of membership in good standing. However, this does not show, as the Union suggests (Br. 28), that discrimination in Section 8(a)(3) requires a differentiation based on union considerations, but merely that, where this is so, it becomes easier to infer that the discrimination had the foreseeable consequence of encouraging union membership.

It may also be noted that the conventional case of employer discrimination which has come before the Board involves the question of whether the employer has discriminated against an employee because of his union activities. Here, too, when the fact of discrimination is established, the inference of effect on union membership readily follows.

Mr. Justice Frankfurter's concurring opinion in *Radio Officers*, which he indicated was "not in disagreement" with the opinion of the Court, also reflects an understanding that the term "discrimination" connotes no more than "disparate treatment." The concurring opinion summarizes the "correct interpretation" of Section 8(a)(3) to be (347 U.S. at 55–56):

> On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the employer acted, it is open for the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute.

Indeed, even the dissenting opinion in that case agrees in this respect. It states, "But the Section does not forbid all 'discrimination.' It carefully limits the conditions under which 'discrimination' is 'unfair.'" 347 U.S. at 57.

Finally, the Board's reading of the term discrimination in Section 8(a)(3)—to comprehend a difference in treatment which is not by itself unlawful or invidious—is not an unusual interpretation of such statutory language. Thus, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(a)), provides that it shall be unlawful "to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In *Federal Trade Commission* v.

Anheuser-Busch, Inc., 363 U.S. 536, it was urged that the mere showing of a price difference was not enough to establish discrimination within the meaning of Section 2(a), because discrimination necessarily connoted an unlawful intent, *i.e.*, an intent to eliminate competition and thereby obtain a monopoly. This Court rejected the contention concluding that (363 U.S. at 549): "there are no overtones of business buccaneering in the Section 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference." The Court added (*id.*, at 550):

> * * * it is only by equating price discrimination with price differentiation that § 2(a) can be administered as Congress intended. As we read that provision, it proscribes price differences, subject to certain defined defenses, where the effect of the differences "may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * *." In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, "discriminate in price." * * * [Footnotes omitted.]

So in the case of Section 8(a)(3) it would "derange" the statutory scheme "to read other conditions into * * * the nondirective phrase" discrimination in regard to employment. The "statute itself spells out the conditions which make" a discrimination in employment "illegal or legal"—*i.e.*, when its purpose or

necessary effect is to encourage or discourage union membership.

For these reasons, we submit that the Union errs when it argues that the hiring agreement in the present case is not discriminatory because it "is expressly made to operate evenhandedly * * *" (Br. 26). A discriminatory standard for obtaining employment does not become the less discriminatory because no exceptions are made in its uniform application. Accordingly, although it may be assumed with the Union that "the dispatching service * * * is open to all" (Br. 26), this does not alter the fact that those who do not follow its procedures are subject to discharge. As shown, this difference in treatment between employees who obtain jobs through the union hall and those who obtain them directly constitutes discrimination in employment within the meaning of Section 8(a)(3). We turn, then, to the remaining question under that Section—*viz.*, whether the Board could validly find that the discrimination effected by the agreement encouraged union membership within the meaning of that provision.

C. THE BOARD WAS WARRANTED IN CONCLUDING THAT A HIRING AGREEMENT WHICH VESTS THE UNION WITH UNLIMITED POWER TO SELECT APPLICANTS FOR EMPLOYMENT HAS THE FORESEEABLE EFFECT OF ENCOURAGING UNION MEMBERSHIP WITHIN THE MEANING OF SECTION 8(a)(3) OF THE ACT

1. *The role of the Board and the courts in applying the statutory standard*

The determination of whether discrimination in employment is "to encourage or discourage membership in any labor organization"—within the meaning

of the second part of Section 8(a)(3)—calls for the Board to perform its function "in the empiric process of administration" of "translating into concreteness the purpose of safeguarding and encouraging the right of self-organization." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 193, 194. Unlike the term "discrimination," the phrase "to encourage or discourage membership in any labor organization," does not lend itself to a fixed or easily ascertainable meaning, at least in the outer reaches of its coverage. Congress there expressed, rather, a generalized injunction against conduct that would undermine the dominant policy of guaranteeing employees freedom to participate, or to refuse to participate, in union activities and organization. The task of particularizing the area in which this language would have its application was entrusted by Congress to the Board. As this Court has held (*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798):

> The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. * * *

This holds equally true for the amended Act, which, insofar as here relevant, did not alter the generality of such provisions as Section 8(a)(3).

Indeed, the statutory language in question exemplifies the kind of economic regulation which Congress determined should be handled primarily through administrative agencies rather than through detailed legislation. Thus, Congress frequently has not gone beyond stating its policy objectives in broad terms with respect to legislation in complex areas of the modern industrial economy. It has thereby delegated, within the prescribed statutory limits, the function of detailed regulation to commissions and boards which have specialized experience in a particular field. "With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy." Landis, *The Administrative Process* (Yale, 1938), pp. 23-24. See also, Davis, *Administrative Law* (1958), Vol. I, pp. 34-44, esp. 37

Against this background, it is clear that the Board's role in applying the phrase "to encourage or discourage membership in any labor organization" requires a focusing of its total experience upon the particular area of application—here the hiring hall—and full recourse to its understanding, from the many cases which have come before it, of the responses of

employees to pressures by employers and unions in the allocation between them of control over hiring and employment. "[T]he Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute." *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 403. "It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 209.

Accordingly, the Board, in concluding whether certain conduct is likely to encourage or discourage union membership, is not confined to the record of any single proceeding, nor is its finding invalidated because it may not be supported by evidence in the particular case that the activity involved actually had that effect or tendency. "'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. The "statutory plan for an adversary proceeding 'does not go beyond the necessity for the production of evidential facts * * *, and compel evidence as to the results which may flow from such facts * * * An admin-

istrative agency * * * may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. * * *'" *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 48–49, quoting from *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800.

In this area, the function of a reviewing court is thus limited to determining whether the agency has made "an allowable judgment." *Securities and Exchange Commission* v. *Chenery Corporation*, *supra*. "Calculating a cumulative effect on employees is not a job for this Court." *National Labor Relations Board* v. *Stowe Spinning Company*, 336 U.S. 226, 231. Since the Board's decision in this case rests upon such a calculation, its findings "carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488, quoted in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 50, with regard to the application of the same statutory language involved in this case. See also, *National Labor Relations Board* v. *Atkins & Company*, 331 U.S. 398, 404; *National Labor Relations Board* v. *Hearst*, 322 U.S. 111, 131; *Siegal Company* v. *Federal Trade Commission*, 327 U.S. 608, 614; *Cardillo* v. *Liberty Mutual Company*, 330 U.S. 469, 470; *Gray* v. *Powell*, 314 U.S. 402, 411–412.[13]

[13] The Union's assertion that the Board's decisions in *Mountain Pacific* and this case represent an attempt to legislate (Br. 49–50), since the Act does not specifically outlaw or prescribe standards for hiring halls, is negatived by the authori-

We shall show that the Board's judgment that, to vest the union with unlimited control over hiring, encourages union membership is reasonable and hence entitled to stand.

2. *The Board's experience with arrangements which give unions exclusive control over hiring*

As described in the Union's brief (pp. 17–23) and in the Board's *Mountain Pacific* decision (119 NLRB 883, 896), the hiring hall has flourished in industries where employment has been sporadic, mobile, intermittent and casual—in industries like maritime, building and construction, and trucking. The casual employment to which the agreement here is applicable is a case in point. In such industries, the employer finds it convenient to depend upon the union for a supply of

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ties cited in the text above. Its further contention that the House Conference Report relating to the 1947 amendments shows an intent to reduce the Board's authority "to exercise its 'expertise'" and to draw inferences (Br. 39, 38–40), is wholly erroneous. It was after reviewing the statements in the Conference Report relied on by the Union that this Court, in *Universal Camera* v. *National Labor Relations Board*, 340 U.S. 476, 488, stated that the amendments were "[not] intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." See also, *Id.* at 486, n. 22. Moreover, the Court reaffirmed this conclusion in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 49–50. Finally, to the extent that the Union's contention in this respect is addressed to the supposition that the Board has rested its finding of a violation on the presumption that the Union will prefer members in its administration of the hiring hall, the contention misconceives the Board's reasoning (see pp. 19–20, 40–42).

manpower for jobs of a limited duration. And in turn, the union has served, in large measure, to provide employees with job security, job control, seniority and other protections which would not otherwise be readily attained in such industries. S. Rep. 986, pt. 5, 80th Cong., 2d Sess., pp. 38–39, 50, 59. It is not surprising in these circumstances that the hiring hall developed hand-in-hand with closed shop practices, i.e., arrangements which limited employers to the hiring of union members.[14] Congress was fully aware, at the time of the 1947 amendments to the Act, of this link between the hiring hall and the closed shop. As Senator Taft stated on the floor of the Senate (93 Cong. Rec. 3836, II Leg. Hist. 1010):[15]

> Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them * * * Such an arrangement gives the union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field.

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[14] See, *e.g.*, Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (U. Mich., 1956), pp. 62, 64, 71; Bertram and Maisel, *Industrial Relations in the Construction Industry* (U. Calif., 1955), pp. 37–38, 45–47; Joint Comm. Rep. 986, 80th Cong., 2d Sess. Part 1, p. 25.

[15] "Leg. Hist." denotes the two volume work Legislative History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948). In addition to Senator Taft's statement quoted in the text, see S. Rep. 105, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 412; 93 Cong. Rec. 4885, II Leg. Hist. 1420.

Congress in 1947 did not specifically outlaw the hiring hall, but sought to deal with its abuses by limiting permissible union-security arrangements to a qualified form of union shop and continuing the Board's broad power to proscribe any other form of discrimination in employment which was designed to, or necessarily tended to, encourage union membership. However, closed shop practices have continued to exist in situations where unions controlled the dispatch or clearance of applicants for employment. Thus, an impartial study of hiring practices in the building trades several years after the passage of the 1947 amendments disclosed that (Haber and Levinson, *Labor Relations and Productivity in the Building* Trades (U. Mich., 1956), p. 71):

> * * * employment arrangements equivalent to those under a closed shop [have remained] in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment; in most instances, men were employed directly or indirectly through the union itself. Both [employers and unions] viewed this as standard practice and showed little concern for the illegality of the arrangement.

Available evidence indicates that this statement is also applicable to the administration of hiring halls in other industries, under the 1947 amendments.[16]

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[16] See Sheldon, *Union Security and the Taft-Hartley Act in the Buffalo Area*, New York School of Industrial Relations Research Bulletin No. 4, p. 41 (1949); Pierson, *Effects of the Taft-Hartley Act on Labor Relations in Southern California*, Proceedings of the 23rd Annual Conference of the Pacific Coast

In consequence, the Board, in the cases which have come before it since 1947, has had a continuing opportunity to observe and study the nature of the hiring hall and allied arrangements. Indeed, one of the most frequent types of Section 8(b)(2) violation—*i.e.*, where a union has caused or attempted to cause an employer to discriminate in violation of Section 8(a)(3)—which the Board has found in this period has occurred in the context of an exclusive hiring arrangement.[17] Hence, when the *Mountain Pacific* case came before it in 1957, the Board had acquired an intimate familiarity with the operation of exclusive hiring arrangements, and was fully aware of the fact that

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Economic Association (1949), p. 78; Craig, *Hiring Hall Arrangements and Practices*, 9 Labor Law Journal (C.C.H., 1958), 939, 942; *Labor-Management Relations in Illini City*, University of Illinois, 1953, Institute of Labor & Industrial Relations (U. of Ill., 1953), Vol. I, pp. 646–647, 749, 773, Vol. II, pp. 148–149.

Congressional hearings and committee reports subsequent to 1947 have similarly evidenced the existence of widespread circumvention of the ban against the closed shop in the operation of hiring halls, particularly those in the maritime industry. See, *e.g.*, Hearings before Senate Subcommittee on Labor-Management Relations, 81st Cong., 2d Sess., Hiring Halls in the Maritime Industry, pp. 7, 13, 62, 87, 184, 198, 213, 318; S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 6–7; Hearings before Subcommittee on Labor and Labor Management Relations, 82nd Cong., 1st Sess., on S. 1044, A Bill to Legalize Maritime Hiring Halls, pp. 70–71, 82, 88, 91.

[17] In the Appendix to this brief, *infra*, pp. 63–66, we list forty-four decisions of this kind taken from the Board's published reports. This list, which does not purport to be a complete one, illustrates the nature of the Board's experience with hiring arrangements. Many other meritorious cases of this type were disposed of prior to formal Board adjudication.

preferential treatment of union members was a frequent, if not predominant, feature of the administration of such arrangements. It was against this background that the Board approached the question of whether an unqualified hiring agreement, standing alone and not containing any assurance to employees that their opportunities for employment would be unaffected by their union affiliation, would have the foreseeable effect of encouraging union membership.

3. The reasonableness of the Board's determination

This Court has stated that the touchstone for the proper application of the statutory prohibition against unlawful encouragement of union membership is "[t]he policy of the Act * * * to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40. The "encouragement" which is prohibited accordingly is that which transgresses this policy, *i.e.*, encouragement resulting from differences in treatment in employment which does not leave employees free to make a choice with respect to union membership.

The *Radio Officers'* decision also makes clear that the term "membership" is not restricted to, although it includes, enrolled union membership. That is, it is not a prerequisite to a violation of Section 8(a)(3) that the activity in question be specifically designed to encourage an employee to sign up as a union mem-

ber, or to retain his membership. Rather, "membership" embraces generally participation in "union activities," and adherence to union principles in order to "stay in good standing in a union." 347 U.S. at 40, 42. Encouragement to attend union meetings, join picket lines, observe union hiring policies, etc., all constitute encouragement of union membership within the meaning of the Act. Accordingly, the hiring hall agreement in this case falls afoul of Section 8(a)(3) if the Board could reasonably conclude that its existence and operation exerted a pressure upon applicants which did not leave them free to decline either to become a union member, to "join in * * * union activities," or to comply "with union obligations or practices." 347 U.S. at 42, 52.

The character of the unlawful encouragement which inheres in unqualified control by a union over hiring has been summarized by the Court of Appeals for the First Circuit in approving the Board's views expressed in the *Mountain Pacific* decision (*National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585):

> In our opinion the Board could well conclude that an applicant who must be "cleared" for a job by a union hiring hall will fear that his opportunity of selection will be small if he does not become a union member, in view of the widely-accepted belief (often encouraged by unions themselves) that hiring halls do operate in a discriminatory manner, and in view of the difficulties facing the applicant if he chooses to enforce his rights (well illustrated in the

factual situation in the *Mountain Pacific* case itself). The Board might further conclude that this apprehension would be materially lessened if there were posted at the hiring hall a notice outlining the exact, non-discriminatory methods by which selection would be made. * * *

The Board in its *Mountain Pacific* decision has amplified this explanation of the manner in which a union-controlled hiring arrangement exerts pressure upon employees to forego their rights to remain unaffiliated, as follows (119 NLRB 883, 895–896):

> From the standpoint of the working force generally—those who, for all practical purposes, can obtain jobs only through the grace of the Union or its officials—it is difficult to conceive of anything that would encourage their subservience to union activity, whatever its form, more than this kind of hiring hall arrangement. Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experiences or virtues are likely to win them jobs at the hands of AGC contracting companies. Instead their concern is, and must be: What, about themselves, will probably please the Unions or their agents? How can they conduct themselves best to conform with such rules and policies as Unions are likely to enforce? In short, how to ingratiate themselves with the Union, regardless of what the Employer's desires or needs might be.
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> * * * * *
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> Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control ove

> the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC chapters, the inference of encouragement of union membership is inescapable. [Footnotes omitted.][18]

Encouragement of applicants to comply with union policy and practices, moreover, does not come alone from the union's unfettered and unilateral control over hiring. Applicants wishing to utilize the hiring hall may not realistically be expected to view its operation divorced from their understanding of and experience with hiring halls as they have traditionally operated. To the job seeker, an arrangement vesting plenary authority in a union to supply men for jobs constitutes a hiring hall in the manner that he has known such halls customarily to exist and operate, at least in the absence of reliable safeguards to the contrary. As we have shown, *supra*, pp. 30–34, power in a union to select applicants for jobs originally developed as a

[18] See also, the Board's restatement of its reasoning in the supplemental decision upon remand from the Ninth Circuit in the *Mountain Pacific* case, quoted in n. 21, p. 41, *infra*.

concomitant to the closed shop in industries characterized by casual employment, and the preferential features of such hiring arrangements have not been substantially eliminated by the invalidation of the closed shop in 1947. From the standpoint of the applicant, then, an unqualified hiring hall arrangement could well carry the meaning that union membership was prerequisite to referral, or, at the very least, that full compliance with all requirements and policies of the union was expected if he was to be dispatched on an equal footing with union members. This analysis of the meaning and effect of hiring arrangements like that in the present case, which the Board is specially equipped to make by virtue of its experience in the field (*supra*, pp. 25–30), plainly supports the conclusion that job applicants are not free, in the absence of reliable assurance to the contrary, to refrain from unionism where their employment opportunities depend upon referral from a union-controlled hiring hall.

The Board's conclusion that union membership is encouraged by requiring an employee to resort to a union-controlled hiring hall to get a job is fully consistent with and supported by this Court's holding in the *Radio Officers'* case respecting the discrimination against employee Fowler. Similar to the situation here, the union in that case caused the discharge of Fowler because he had obtained a job by himself without clearance from the union hiring hall. The Court agreed with the Board that the "union in causing the employer to discriminate against Fowler by denying him employment in order to coerce Fowler into fol-

lowing the union's desired hiring practices deprived Fowler of a protected right" and thereby unlawfully encouraged him "to remain in good standing in [the] union". 347 U.S. at 42.[19]

The Union would distinguish the *Radio Officers'* situation on the ground that the requirement in that case of obtaining employment through the union hiring hall was "a membership rule," whereas in the present case the requirement was embodied in the terms of a contract (Br. 26, 28). This factual difference, however, is not necessarily relevant to the question of whether a compulsory hiring procedure encourages union membership within the meaning of Section 8(a)(3). That question is to be resolved, as we have shown, in terms of the nature of the hiring procedure and its foreseeable effect on employees, not upon the happenstance of whether the hiring procedure is contained in union rules or in a contract. Thus, it has long been settled that a union membership obligation which exceeds the permissible statutory limits does not escape the ban against encouragement of union membership if it happens to be embodied in a collective bargaining agreement. See

[19] The holding in *Radio Officers'* also negates the Union's assertion (Br. 27-28) that the hiring agreement in this case does not show a "purpose" to encourage union membership. As the Court ruled in that case, an "intent to encourage is sufficiently established" by showing that encouragement is a "natural consequence" of the conduct in question. The conduct in this case is identical for present purposes with that in *Radio Officers'*, *i.e.*, the imposition of a requirement that applicants follow "the union's desired hiring practices" in order to obtain employment. 347 U.S. at 42, 45. If the purpose to encourage is inferable in the one case, it is also inferable in the other.

cases cited at n. 10, *supra*. In short, the question is not where the requirement for acquiring or retaining employment is expressed—in a contract or in union bylaws or rules—but whether it is of a character that may reasonably deprive applicants and employees of full freedom in the exercise of their right to refrain from union activities, policies, and membership. Accordingly, the same considerations which warranted the conclusion in *Radio Officers'*, that to precondition employment upon "following the union's desired hiring practices" (347 U.S. at 42) was unlawfully to encourage union membership, are also operative with respect to the identical hiring procedures which were required by contract in the present case.[20]

For these reasons, as well as those set forth pp. 17–20 *supra*, the Union misconceives the basis of the Board's *Mountain Pacific* decision when it asserts that the inference drawn by the Board from the existence of a union-controlled hiring procedure is "that the union

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[20] *National Labor Relations Board* v. *Furriers Joint Council*, 224 F. 2d 78 (C.A. 2), relied on by the Union (Br. 26, 28), is not to the contrary. The Court of Appeals in that case premised its decision that the Act did not proscribe coercion directed at employees who violated the terms of a collective bargaining agreement on the assumption that the contractual provision involved—a restriction on overtime work—was valid. 224 F. 2d at 80. There is no suggestion in either that case or in *National Labor Relations Board* v. *Rockaway News Supply Company*, 345 U.S. 71, 80, also cited by the Union (Br. 26), that a union requirement which is independently invalid under the Act sheds its amenability to correction by incorporation into a contract. And the question of whether an agreement is independently invalid—the issue in this case—is scarcely controlled by holdings that enforcement of an admittedly valid agreement is not an unfair labor practice.

will exercise its authority discriminatorily by denying referral to employes because of nonmembership or default in the performance of a membership obligation" (Br. 34). The Board has entertained no such presumption of preferential treatment of union members. As stated in the *Mountain Pacific* decision, the violation which results from conditioning employment upon clearance or dispatch by a union, without adequate assurances that nonmembers will be treated on an equal basis with members, is that such a procedure "apart from all other evidence * * * encourages [employees'] subservience to union activity" (119 NLRB at 894–895).[21] That is, the hiring arrangement itself effects a discrimination in employment; the Board has merely inferred that the foreseeable effect of such discrimination is to encourage union membership. Accordingly, the present case involves no presumption that the Union will illegally prefer union members in the operation of the hiring hall. See *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585 (C.A. 1). Nor, on the other hand, does the Board's determination merely "condemn the union on the basis of an employee's belief" that such preference might be given (Br. 36).

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[21] Similarly, the Board has reiterated, in its decision upon the remand in *Mountain Pacific*, that "the vice in [an unqualified exclusive hiring arrangement] lies in the fact that * * * employees whose job opportunities are controlled exclusively by the union will fear, and reasonably so, that union membership or lack of it will be a factor in obtaining referral by the union * * * [and that] therefore, the employees will be encouraged to become or remain members of the union" (127 NLRB No. 156, 46 LRRM 1200).

It is the execution and maintenance of the hiring agreement—the Union's and the Company's own act—that constitutes the violation. If, in the realities of industrial life, it can fairly be said that the foreseeable consequence of such a contract is, as we have shown, to encourage union membership, the Union and the Company cannot escape these consequences of their contract by a claim that employees should not respond as they do to the procedures provided therein. Indeed, this is the precise holding of the Court in *Radio Officers'* with respect to the role of motive in the interpretation of Section 8(a)(3). 347 U.S. at 42–48.

The Union further contends that the Board's conclusion that a union hiring hall inherently encourages union membership requires also the conclusion that "any service [a union] well performs will 'inherently' encourage union membership," including all of its ordinary functions as representative of employees (Br. 34–35). This may be so, but it does not follow that a union thereby violates the Act. Section 8(a)(3) of the Act "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited." *Radio Officers'*, 347 U.S. at 42–43. It is not until the union or the employer makes a difference in treatment with respect to hire or employment that the inquiry as to whether such difference encourage membership becomes relevant. The factual situation in *National Labor Relations Board* v. *Gaynor News Company*, one of the three cases treated in the decision in *Radio Officers'*, illustrates the point. In *Gaynor*

the agreement between the employer and the union, which was the representative of both union and non-union employees, provided a wage increase for only the union employees. A general wage increase obtained by the union, of course, would have been completely lawful, however much it might have encouraged union membership. The contract in *Gaynor*, though, was found to violate Section 8(a)(3) for a difference was made among the employees as to the distribution of the benefits. That is, the encouragement of union membership inherent in a wage increase was shown to be accomplished by "discrimination," within the meaning of the first part of the statutory prohibition.[22]

[22] We do not suggest that every discrimination in employment constitutes a statutory violation if it has any possible effect, however slight, of encouraging union membership within the meaning of Section 8(a)(3). Some minimal encouragement of union membership, within a literal meaning of that phrase, may remain from the mere fact that employees must apply for jobs through a union even if the guarantees prescribed by the Board are present (see *infra*, pp. 51–60). As the Board observed in its *Mountain Pacific* decision, however, not every literal form of encouragement requires a finding of a violation (119 NLRB at 897–898). Other statutory provisions and objectives which must be taken into account would preclude pushing any one provision to its extreme as a matter of abstract logic. It "is the entire Act, and not merely one portion of it, which embodies 'the definitive statement of national policy.'" *Local Lodge 1424, I.A.M.* v. *National Labor Relations Board*, 362 U.S. 411, n. 7 at 418. See also the cases cited *infra*, p. 57, and n. 32, *infra*. As we show *infra*, pp. 51–60, a union-operated hiring hall containing the safeguards specified by the Board represents a reasonable adjustment between the statutory objective of a free exercise of employee rights and that of encouraging agreement between employer and union as to such matters as hiring procedures. Viewed in this light, the Union's

In sum, the encouragement of union membership which the statute forbids is established in this case by the foreseeable effects which the Board could properly conclude that an exclusive hiring agreement has upon job applicants and employees. The Union's contentions to the contrary are in the main grounded upon its implicit insistence that the phrase "to encourage or discourage membership in any labor organization" be read out of Section 8(a)(3) (see pp. 18–19, 21, *supra*). Properly construed, this provision presents none of the difficulties which the Union would attach to the Board's determination here and in *Mountain Pacific*.[23]

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assertion (Br. 35) that the Board's reasoning would require it to find a violation where an employer retains exclusive control over hiring, on the ground that such control would operate to discourage union membership, cannot be treated as a serious contention. Whatever might be said as to the discouragement effects of a particular method of hiring by a given employer, it is plain that there is no evidence warranting a conclusion that employee freedom to organize is unduly discouraged by the mere fact that an applicant is required to ask an employer for a job. The Board's conclusion respecting the union-operated hiring hall, on the other hand, rests upon cogent evidence of the link between the closed shop and the hiring hall, and of the peculiar pressures to which applicants are subject in this specialized system of hiring.

[23] The validity of the Board's ruling here and in *Mountain Pacific* is not affected by Section 8(f) of the Act, which was enacted in 1959, subsequent to the *Mountain Pacific* decision. Section 8(f) pertains only to agreements in the building and construction industry, and provides, *inter alia*, that pre-hire agreements are not unlawful even though they establish a referral system of hiring and specify objective qualifications for priority in referral. Quite apart from the fact that the building and construction industry is not involved in this case, the House Conference Report states flatly that "Nothing in such

The legality of exclusive hiring halls under the Act was not comprehensively treated by the Board in its decisions prior to the *Mountain Pacific* case.[23] In the interval following that decision four circuits have had occasion to pass on the validity of the Board's determination. As noted p. 16 *supra*, the court below and the First Circuit have approved the ruling, and the Courts of Appeals for the Sixth and Ninth Circuits have declined to enforce Board orders in cases in-

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provision is intended to restrict the applicability of the hiring hall provisions enunciated in the *Mountain Pacific* case * * *." H. Conf. Rep. 1147, 86th Cong., 1st Sess., p. 42. As the First Circuit has pointed out, moreover, "The amendment is in no way inconsistent with the Board's rule, and in fact affirmative Congressional approval might be inferred from the statement in the Conference Report * * *." *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586, n. 4.

[24] In the majority of cases involving a hiring hall, decision of the Board rested on the existence of preferential treatment of union members. See the cases collected in the Appendix, *infra*, pp. 63–66. The dicta relating to the effect of an exclusive hiring arrangement, standing alone, do not reflect an altogether consistent position in the early cases. Compare *Hunkin-Conkey Construction Company*, 95 NLRB 433, 435, with *The Lummus Company*, 101 NLRB 1628, 1631, n. 8. Of pertinence here, perhaps, is the observation of this Court that "in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize * * *." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241.

volving exclusive hiring agreements.[25] The considerations advanced in the adverse decisions do not, we submit, impair the validity of the foregoing analysis.

The Sixth Circuit decision, *National Labor Relations Board* v. *E & B Brewing Company*, 276 F. 2d 594, appears to rest, not on an evaluation of the Board's *Mountain Pacific* decision, but on procedural grounds not raised by the Union in the present case.[26] The Ninth Circuit met the problem directly in *National Labor Relations Board* v. *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 270 F. 2d 425, holding, contrary to the Board, that a hiring hall cannot give rise to a violation of the Act unless there is in fact preference given to union members in job referrals, or unless the parties intend that it shall so operate (*Id.*, at 429–431). However, the court acknowledged (at p. 432) that the Board could draw an inference of an intent to prefer from the

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[25] The Union errs in stating that the Court of Appeals for the Second Circuit has rejected the Board's holding in *Mountain Pacific* (Br. 32). In each of the two cases cited by the Union the Second Circuit expressly reserved decision as to the validity of the Board's position. *Morrison-Knudsen Company* v. *National Labor Relations Board*, 275 F. 2d 914, 917; petition for certiorari pending on another issue, No. 120, this Term; *National Labor Relations Board* v. *News Syndicate Company*, 279 F. 2d 323, 330, petition for certiorari pending on another issue, No. 339, this Term.

[26] The Sixth Circuit held first, that the record in the case before it did not present the validity of the hiring agreement for determination, and second, that the Board's application of its *Mountain Pacific* ruling in that case constituted an improper retroactive "change of rules." We have set forth our reasons for believing that these grounds are insubstantial in our petition for certiorari in that case, No. 211, this Term, pp. 11–13.

failure to include protective clauses in the contract, but "such a rule of evidence should operate prospectively, since the burden is thereby shifted." That is, since the parties in *Mountain Pacific* itself were not afforded an opportunity to rebut that inference, the absence of those clauses could not, in the Court's view, be used to establish an illegal intent in that case.

The holding of the Ninth Circuit appears to rest, as the First Circuit has suggested in *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585, on a premise which we have shown to be erroneous, *viz.*, that the Board's position is that the existence of the hiring hall gives rise to a presumption that the union will prefer union members. As the First Circuit correctly notes, however, the Board's view is simply that, without the protective clauses (276 F. 2d at 585–586):

> * * * an exclusive hiring hall constitutes undue encouragement of union membership. This inference would not be rebuttable by proof that the union's operation of the hall involved no discrimination in fact. * * * This was not a shifting of the burden of proof. It was simply a modification of the Board's views, in the continuing development of its expertise, as to undue encouragement. If this determination of the Board was retroactive it was no more so than whenever a court of law decides, on further consideration, to modify earlier views. * * *

Nor is the Board's position here weakened by the fact that, before issuance of the Board's *Mountain*

Pacific decision, a number of Courts of Appeals had expressed the view, usually by way of dicta, that a hiring arrangement which vested a union with the right to refer job applicants did not of itself violate the Act. The statement of the Eighth Circuit is typical: "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Company* v. *National Labor Relations Board*, 196 F. 2d 841, 845.[27] These statements were made without the benefit of a record which squarely presented and narrowed the issue, and the light shed thereon by the Board in its *Mountain Pacific* decision. It is significant that the First Circuit had expressed the view, before it was directly presented with the *Mountain Pacific* issue, that "It is not illegal for an employer to rely upon a union to provide it with employees." *National Labor Relations Board* v. *International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350. That court, nonetheless, unanimously approved the Board's *Mountain Pacific* holding that an exclusive arrangement of this character is invalid where no assurances are given to employees that membership

[27] See also, *Eichleay* v. *National Labor Relations Board*, 206 F. 2d 799, 803 (C.A. 3); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943 (C.A. 3); *National Labor Relations Board* v. *McGraw Co.*, 206 F. 2d 635, 640 (C.A. 6); *National Labor Relations Board* v. *Swinerton*, 202 F. 2d 511, 514 (C.A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Local 10, International Longshoremen's and Warehousemen's Union*, 214 F. 2d 778, 781 (C.A. 9); *National Labor Relations Board* v. *Thomas Rigging Company*, 211 F. 2d 153, 157 (C.A. 9), certiorari denied, 348 U.S. 871.

or adhere to union policies is not a prerequisite of referral. *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters,* 276 F. 2d 583. As the court recognized, the Board may appropriately modify its views or adopt new approaches to problems of this kind "in the continuing development of its expertise". 276 F. 2d at 586.[28]

II. THE HIRING AGREEMENT IN THIS CASE INDEPENDENTLY VIOLATED SECTIONS 8(a)(1), AND 8(b)(1)(A) OF THE ACT

Sections 8(a)(1) and 8(b)(1)(A) of the Act prohibit an employer and union, respectively, from restraining or coercing employees "in the exercise of the rights guaranteed in Section 7". The latter Section in turn provides, in material part, that employees have the right "to form, join, or assist labor organizations * * * and to engage in other concerted activities * * * and * * * to refrain from any or all such activities * * *". These provisions, which the Board also found to have been violated by the maintenance of the hiring agreement in this case (R. 36), differ from Sections 8(a)(3) and 8(b)(2) in that they do

[28] It may also be noted that the early statements may be fully consistent with the Board's present position to the extent that they relate to nonexclusive hiring agreements with unions, *i.e.*, agreements whereby the union-controlled hiring hall is one, but not the exclusive, means by which an applicant may obtain a job. If an applicant has alternative ways of securing employment, it scarcely may be said either that the arrangement discriminates against him, or that it restrains his freedom of choice respecting unionism. *National Labor Relations Board* v. *Brotherhood of Painters*, 242 F. 2d 477 (C.A. 10); *Miami Valley Carpenters District Council, and Bowlings Supply and Service, Inc.*, 127 NLRB No. 136, June 10, 1960.

not depend on a showing of discrimination in hiring or encouragement of union membership. All that is required to sustain a violation of the provisions now under consideration is that the hiring agreement had a reasonable tendency to restrain or coerce employees in their right "to refrain" from assisting unions or engaging in union activities.

That the hiring agreement in this cases had this prohibited effect is established by the same considerations which show that applicants and employees subject to it are unlawfully encouraged to become union members. Thus, as we have shown, the Board could reasonably conclude that job applicants who must obtain employment through the Union's hiring procedures are deprived of any meaningful freedom to ignore union rules and policies, at least in the absence of adequate assurances of fair treatment for the non-union applicant. It is the singular purpose, however, of Sections 8(a)(1) and (b)(1)(A) to protect employees in the exercise of their right to support or refrain from unionism against undue pressures by employers and unions. Conduct which has the effect of adversely threatening employment opportunities traditionally has been regarded as constituting "restraint and coercion" within the meaning of these provisions. See, *e.g.*, *National Labor Relations Board v. Electric Vacuum Cleaner Company*, 315 U.S. 685, 692-693; *National Labor Relations Board* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625 (C.A. 2); *National Labor Relations Board v. Local 401, Teamsters*, 205 F. 2d 99, 101-102, n. 2 (C.A. 1); *National Labor Relations Board v. Local 55, United Brother-*

hood of Carpenters, 205 F. 2d 545, 516 (C.A. 10). And where, as here, such restraint is brought to bear in connection with the Section 7 right to refrain from supporting union policies or joining a union, the violation is established. See in addition to the cases cited above, *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943–944 (C.A. 3); *National Labor Relations Board* v. *Local 1423, Carpenters' Union*, 238 F. 2d 832, 837 (C.A. 5). In short, the pressures inherent in an unqualified union-controlled hiring procedure which tend to inhibit a full exercise of Section 7 rights by job applicants bring the present hiring agreement directly within the proscriptions of Sections 8(a)(1) and 8(b)(1)(A) of the Act.

III. THE BOARD COULD VALIDLY DETERMINE THAT THE ILLEGALITY OF AN AGREEMENT WHICH VESTS EXCLUSIVE HIRING AUTHORITY IN A UNION MAY BE OVERCOME BY INCLUSION IN THE AGREEMENT OF THE PROTECTIVE CLAUSES SPECIFIED BY IT

As we have shown, the Board's *Mountain Pacific* holding, which was applied in this case, rests on the theory that an agreement which unqualifiedly vests a union with exclusive power to select job applicants unduly deters employees subject to the agreement from exercising their statutory right to abstain from unionism. Under this reasoning, it would follow that, if the parties to the agreement were to take appropriate steps to eliminate or neutralize the improper effects on applicants of their hiring procedures, the illegality in an exclusive hiring arrangement would be eliminated. Accordingly, the Board in its *Moun-*

tain Pacific decision made clear that its interpretation and application of the relevant statutory provisions in that case did not necessarily outlaw all hiring agreements.[29] Indeed, the overall impact of the *Mountain Pacific* decision has not been, and was not intended to be, destructive of the hiring hall as an institution, but to hedge its operation to the extent necessary to make it compatible with the free exercise of employee rights guaranteed by the Act.[30]

In short, since, in the Board's view, the "vice in the * * * [exclusive] hiring hall lies in the fact of unfettered union control over all hiring" (119 NLRB at 896), the Board has also undertaken to specify the means for overcoming the unlawful aspects of such arrangements, *i.e.*, the means for reducing the union's control and assuring employees that referral would

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[29] Compare the statement of Senator Taft in S. Rep. 1827, 81st Cong., 2d Sess., p. 14 (Un. Br. 23–24): "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them * * *. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union."

[30] The Board in reaching its conclusion in the *Mountain Pacific* case was fully aware of the useful and important function performed by hiring halls in many industries. As it stated (119 NLRB at 896, n. 8): "It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants."

not turn upon their union affiliation or support. Thus, the Board indicated in the *Mountain Pacific* decision (119 NLRB at 897).

> that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated * * * only if the agreement explicitly provided that:
>
> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

The Board also noted that "The basis for a union's referral of one individual and refusal to refer another may be any selective standard or criterion which an employer could lawfully utilize in selecting from among job seekers" (*ibid.*).

The appropriateness of these protective clauses for safeguarding employee rights is plain. Satisfaction of the first requirement—that the agreement provide for selection of job applicants without reference to union considerations—serves to disabuse the em-

ployees of any fear that they must please the union to obtain employment. This minimal step in no way interferes with the legitimate functioning of a hiring hall. The Union's suggestion (Br. 45) that such a clause serves no purpose, because it will not deter unions bent on prefering their members for jobs from doing so, has relevancy only upon the assumption, which we have shown to be erroneous (*supra*, pp. 19–20, 40–42), that the illegality to which the safeguard clauses are addressed is the unions' presumed propensity to administer hiring halls to the advantage of their members. These clauses are not designed to prevent preferential treatment of union members; rather, they are designed to overcome the unlawful encouragement to union membership which the exclusive hiring hall necessarily exerts upon job applicants. The obvious first step in this direction is to assure applicants that referrals will not be made on the basis of union membership considerations.

The second requirement—that the employer be given the right to reject referred applicants—lessens the control of the union over the hiring function and thereby tends to eliminate any fear of job applicants that the union will act arbitrarily or preferentially. Moreover, if the employer can reject any person referred by the union hiring hall, employees are put on notice that their qualifications are likely to be determinative of their success in securing work, rather than conformity "with such rules and policies as unions are

likely to enforce" (119 NLRB at 895).[31] The Union argues, however, that this requirement is futile because the employer's right to reject would not be exercised until too late to prevent any unlawful preference of union members in the referral process, and adds that in any event the record shows in the present case that employers as a matter of practice exercised a right of rejection under the agreement in this case (Br. 45–46). As to the first point, the Union again wrongly assumes that the purpose of the safeguard clauses is to prevent actual preference of union members in the operation of a hiring hall. We have shown, however, that their purpose is to lessen the encouragement which would otherwise flow from unfettered union control; giving the employer the right to reject assures all employees that, even if a union employee is preferred, the employer need not accept him if he is unqualified or the employer does not desire to acquiesce in the illegal preference, thereby leaving the job open for a qualified employee regardless of union affiliation. As to the Union's second point, there is no

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[31] Compare the statement in the Senate Report relating to the Senate's 1947 proposals for outlawing the closed shop (S. Rep. 105, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 412):

"[The hiring hall] not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires."

See also, the statement of Senator Taft on the floor of the Senate during consideration of the 1947 amendments (93 Cong. Rec. 3836, II Leg. Hist. 1010):

"If in a few rare cases the employer wants to use the union as an employment agency, he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the men recommended by the union."

question that the alleged practice of permitting employer rejection was not incorporated in the contract nor posted (n. 7, p. 16, *supra*); thus, the employees could not have been apprised of it sufficiently to alleviate the unlawful encouragement of the hiring arrangement here.

The Union also complains that the reservation in the employer of the right to reject applicants does not permit differences of opinion between the union and employer as to an applicant's qualifications to be settled through grievance procedures (Br. 43–45). Even were this so, it does not follow that the right to reject requirement is improper. The end in view is not simply to guarantee the freedom of the contracting parties to reach agrement upon the handling of controversies. Rather, it is to overcome an impairment to employee freedom. The impairment results from the unfettered control that a hiring agreement like the instant one gives to the union, and the removal of such impairment necessitates a lessening of that control. The Board could reasonably conclude that, the extent to which freedom of contract is restricted by the right to reject requirement, is warranted in order to accommodate the right of nonunion members to have uncoerced access to the hiring procedures. The issue, in short, is how the tension between contractual freedom of the parties and the right of job applicants to be free from improper pressures created by contracts may best be kept in balance. The fact that the balance struck by the Board may cut to some extent into contractual freedom shows only that the Board has made an ac-

commodation of competing interests, both of which must be recognized under the Act.[32] This, of course, is a function which the Board frequently, and properly, performs. See, *e.g.*, *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 96; *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357, 364; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798.

Finally, the third requirement—the posting requirement—informs employees and applicants of the "provisions relating to the functioning of the hiring agreement," and thereby puts them on notice of the criteria which will govern referrals to jobs. Open notice that all who utilize the hiring hall will be treated without regard to their union sympathies or support is perhaps the most effective method of disabusing employees of the conclusion, which they might otherwise reasonably draw from the existence of a union-controlled hiring arrangement, that preferential treatment would be accorded to union members.[33]

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[32] Compare the statement of Mr. Justice Holmes in *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

[33] The Union contends that the posting requirement of the *Mountain Pacific* safeguards is invalid because "the essential precondition to the exercise by the Board of any power to require a person to post notices is a finding that the person has committed an unfair labor practice." (Br. 48.) The Union

In addition to its challenge to the individual standards, the Union contests the Board's authority to establish any safeguards at all, which must be observed by parties who wish to enter into an agreement providing for union-controlled hiring procedures. The gravamen of the argument is that the Board is attempting "to require incorporation of substantive terms into an agreement," contrary to the Act's policy of encouraging parties to reach agreement on their own (Br. 43, 41–43).

The contention loses sight of the relationship which the safeguard clauses have to the Board's finding of a violation based on an exclusive hiring agreement. The violation is based on the existence of the hiring agreement itself. If the Board is right in finding the violation, it is entitled to a decree enforcing its order which enjoins continuation of the unlawful contract, irrespective of its further conclusions as to the means by which such contracts may lawfully be made. It does not follow, however, that the Board is without authority to indicate its views with respect to the latter. Indeed, in view of the prevalence and importance of union referral systems in many industries, the Board's role as an administrative agency with regulatory power relating to the hire and tenure of employees plainly encompasses the obligation, not

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errs in equating the *Mountain Pacific* notice with one designed to expunge the effects of an unfair labor practice. The former is not designed to remedy an unfair labor practice, but is merely part of the means whereby the parties may, if they so desire, avoid the commission of an unfair practice. See also, pp. 58–60, *infra*.

only to condemn illegal hiring arrangements, but to chart the course whereby the parties may avoid such illegality in the future.[34] This is particularly true where, as here, the Board's analysis of the statutory provisions upon which the violation is based leads directly to the further question as to how the illegality may be overcome.

In this light, the protective clauses specified by the Board reflect not a gratuitous imposition of clauses into collective bargaining agreements (Un. Br. 43), but rather the Board's administrative judgment of the extent to which the Act permits hiring halls to be maintained. The Board has not ordered the parties to include these clauses in their agreement; indeed, the parties are free to abandon the hiring hall altogether if they desire. The Board has put the parties on notice, however, that the full measure of employee freedom guaranteed by the Act is compatible with a union-controlled hiring system only where the specified safeguards are included. This is no more than the Board and the courts have traditionally done in finding that a contractual provision falls short of the standard of legality. For example, it has frequently been determined that a particular savings clause is not sufficient to immunize an otherwise invalid union security agreement, on the ground that an employee cannot be expected to understand its applicability. The Second Circuit, in such a situation, has stated that "Only a specific provision deferring application of the union-security clause will immunize the con-

[34] See Friendly, *A Look at the Federal Administrative Agencies*, 60 Col. L. Rev. 429, 436–437, 442–443 (1960).

tract against this illegality." *National Labor Relations Board* v. *Gaynor News Company*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed, 347 U.S. 17.[35] Similarly, it has been noted by the courts and the Board that a union security contract, to justify a discharge thereunder, must be expressed in clear and unmistakable language.[36] Determinations of this character, like the specification by the Board of the safeguard clauses, affect the substantive provisions of contracts. But, they are privileged if they are a reasonable means of implementing a statutory prohibition. That the safeguard clauses set forth in the *Mountain Pacific* case, and equally applicable to the hiring agreement in this case, are a valid means of eliminating the illegality that otherwise inheres in an exclusive hiring agreement has already been shown.

IV. THE BOARD PROPERLY FOUND THAT THE DISCHARGE OF EMPLOYEE SLATER VIOLATED SECTIONS 8(a)(3) AND (1) AND 8 (b) (2) AND (1)-(A) OF THE ACT

Employee Slater, as shown in the Statement, *supra*, pp. 5–6, was discharged by the Company, at the request of the Union, because he had not obtained employment in accordance with the procedures established by the hiring agreement. This agreement, as we have shown,

[35] See also, *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519, 521–522 (C.A. 9); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 557 (C.A. 10).

[36] See, *e.g.*, *National Labor Relations Board* v. *Electric Vacuum Cleaner Company*, 315 U.S. 685, 694–695; *National Labor Relations Board* v. *Don Juan, Inc.*, 178 F. 2d 625, 626, 185 F. 2d 393, 394 (C.A. 2).

was unlawful. In short, Slater's loss of employment resulted from the enforcement against him of an unlawful hiring agreement. It is settled law that such discrimination violates Sections 8(a) (3) and (1) and 8(b)(2) and (1)(A) of the Act. See, *e.g.*, *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586 (C.A. 1); *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U.S. 917; *National Labor Relations Board* v. *Waterfront Employers*, 211 F. 2d 946, 952 (C.A. 9); *National Labor Relations Board* v. *Alaska Steamship Company*, 211 F. 2d 357, 359–360 (C.A. 9); *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America, AFL–CIO*, 259 F. 2d 741 (C.A. 7); *National Labor Relations Board* v. *McCloskey & Company*, 255 F. 2d 68, 70–71 (C.A. 3). Indeed, the Union does not contest in its brief the validity of the Board's finding as to Slater's discharge if the Board's finding as to the hiring agreement is correct.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it granted enforcement of the Board's order. Insofar as that judgment denied enforcement of the reimbursement provisions of the Board's order, the Court is respectfully referred to the Board's brief in No. 68 (see n. 1, pp. 3–4, *supra*).

Respectfully submitted.

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OCTOBER 1960.

APPENDIX

The following cases, decided after the 1947 amendments to the Act but before the Board's *Mountain Pacific* decision, involve violations of the Act found by the Board in situations in which a union exercised exclusive control over hiring procedures:

Carpenters Local 1498 and 184 (Utah Construction Co.) 95 NLRB 196.

Operating Engineers Local 57 (Gammino Construction Co.) 97 NLRB 386, enforced, 201 F. 2d 771 (C.A. 1).

Boilermakers Local 6 (Consolidated Western Steel Corp.) 94 NLRB 1590.

Boilermakers and its Local 92 (American Pipe and Steel Co.) 93 NLRB 54.

Chain Service Restaurant Employees Local 42 (Childs Co.) 93 NLRB 281, enforced as modified, 195 F. 2d 617 (C.A. 2).

Retail Clerks Local 770 (Hollywood Ranch Market) 93 NLRB 1147.

Longshoremen's Association Local 1291 (Jarka Corp.) 94 NLRB 320, enforced as modified, 198 F. 2d 618 (C.A. 3).

Longshoremen's and Warehousemen's Union and its Local 10 (Pacific Maritime Association) 94 NLRB 1091, enforced, 210 F. 2d 581 (C.A. 9).

Teamsters Local 621 (Sesco Contractors) 98 NLRB 824.

American Radio Association (Alaska Steamship Co.) 98 NLRB 22, enforced as modified, 211 F. 2d 357 (C.A. 9).

Operative Plasterers Local 867 (Morrison-Knudson Co.) 101 NLRB 123.

Longshoremen's and Warehousemen's Union and its Local 19 (Waterfront Employers of Washington) 98 NLRB 284, enforced, 211 F. 2d 946 (C.A. 9).

Marine Cooks and Stewards (Pacific American Shipowners Assoc.) 98 NLRB 582.

Newspaper and Mail Deliverers Union (New York Times Co.) 101 NLRB 589.

Boilermakers and its District Lodge 57, Locals 363, 679 (Ebasco Services, Inc.) 107 NLRB 617.

Boilermakers Local 13 (Babcock and Wilcox Co.) 105 NLRB 339.

Heat and Frost Insulators Local 28 (Construction Specialties Co.) 102 NLRB 1542, enforced, 208 F. 2d 170 (C.A. 10).

Operative Plasterers Local 797 (Haddock Engineers Ltd.) 104 NLRB 994, enforced as modified, 215 F. 2d 734 (C.A. 9).

Longshoremen's Association, District Councils and Locals (Puerto Rico SS. Assoc.) 103 NLRB 1217, enforced, 211 F. 2d 274 (C.A. 1).

Pacific Coast Marine Firemen (American President Line) 107 NLRB 593.

Carpenters Local 472 and Machinists Union (McGraw Construction Co.) 107 NLRB 1043.

Carpenters Local 1281 (J. C. Boespflug Co.) 109 NLRB 874.

Carpenters Mohawk District Council, et al. (Grow Construction Co.) 109 NLRB 522, enforced, 222 F. 2d 542 (C.A. 2).

Electrical Workers Local 1533 (Golden Valley Electric Association, Inc.) 109 NLRB 397.

Iron Workers Local 595 (Bechtel Corp.) 108 NLRB 1070, enforced, 218 F. 2d 958 (C.A. 6).

Machinists Association, et al. (*Seabright Construction Co.*) 108 NLRB 8.

Iron Workers Local 595 (*R. Clinton Construction Co.*) 109 NLRB 73.

Teamsters Local 148 (*Harry Griffin Trucking Co.*) 114 NLRB 1494.

Carpenters Local 1423 (*Columbus Showcase Co.*) 111 NLRB 206, enforced, 238 F. 2d 832 (C.A. 5).

Millwrights Local 2484 (*W. S. Bellows Construction Corp.*) 114 NLRB 541.

Electrical Workers Local 948 (*Hall Electric Co.*) 111 NLRB 68.

Hod Carriers Local 264 (*Jones-Hettelsater Construction Co.*) 112 NLRB 1482.

Hod Carriers Local 369 (*Frommeyer and Co.*) 114 NLRB 872, enforced as modified, 240 F. 2d 539 (C.A. 3).

Operating Engineers Local 12 (*AGC, Southern Calif. Chapter*) 113 NLRB 655, enforced as modified, 237 F. 2d 670 (C.A. 9).

Iron Workers Local 36 (*H. E. Stoudt and Son, Inc.*) 114 NLRB 838.

Carpenters, its Locals 1400 and 1046, et al. (*Pardee Construction Co.*) 115 NLRB 126.

Operating Engineers Locals 18, 18–A, and 18–B (*Hatcher Bros., Inc.*) 116 NLRB 1145.

Hod Carriers Local 276, et al. (*Mountain Pacific, Seattle, and Tacoma Chapters of AGC*) 117 NLRB 1319.

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